TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF FACTS

A review of the Statement of Facts in the Substitute Brief of Respondents reveals several areas where the facts must be more accurately or completely stated in order to avoid Respondents' biased and incomplete view of them. The page references are to the Statement of Facts section of Respondents' Substitute Brief, unless otherwise indicated.

First, Reynolds' Affidavit does not state he was "forced to leave A-B himself." (Resp. Sub. Br. 11). This statement of that fact attempts to color it so that Reynolds is in a far more praise-worthy situation (indeed comparable to Appellant) than he may very well have been. In fact, Reynolds' Affidavit states, "After completion of the reorganization, I subsequently left the company." (LF 29). If this inference of self-sacrifice is intended to color the interpretation of how this 1997 cost-cutting layoff occurred, and to emphasize the purity of Respondents' actions, then Appellant would suggest that it is probable that an individual at such an influential position as Reynolds with the solo authority Respondents attempted to ascribe to him, left the company without substantial hardship to himself, while creating substantial hardship for Appellant.

Further, Respondents refer to, "four years after his comments about the M&R warehouses … he was terminated." (Resp. Sub. Br. 11). Again, the inference is that nothing occurred between June 10, 1994, and June 30, 1998. This mischaracterizes the facts.

On page 12 Respondents discuss the Appellant's Federal age discrimination lawsuit and suggest that it was filed May 27, 1999, as an age discrimination suit "alleging, among other things, an age discrimination complaint." In fact, this lawsuit was filed in several Counts, one

of them clearly being the whistleblower claim that is being asserted in this case. (LF 162 – 165). Appellant has therefore been in court, seeking judicial relief for whistleblowing retaliation, since May 27, 1999. Judge Hamilton clearly declined to make any ruling on the wrongful discharge count when she entered a Summary Judgment on the age discrimination count. The clear thrust of her October 12, 2000, Order was that the wrongful discharge claim was more properly a state court claim on which she declined to rule. After this decision was affirmed by the 8th Circuit, Appellant then timely filed the claim in state court resulting in the current dispute over, among other issues, the exclusive causation element of this common law state tort.

Additionally, on page 13, Respondents reproduce a quote from one of two depositions of Appellant, both given before Bruce Wilson's revelations in his May 19, 2000, deposition. What Respondents' Statement of Facts does not indicate is that the Appellant's deposition Respondents cite was taken on November 19, 1999. (LF 33). The significant fact omitted from Respondents' Statement of Facts is that the June 10, 1994, letter to Terry Floyd that is referred to in the quoted portion of Appellant's deposition extract, was the joint production of Respondents' employee, Floyd, and Bruce Wilson, M&R's manager. This is significant because the depth and scope of Respondents' involvement in the production and circulation of this letter was not revealed to Appellant Kunkel until Wilson disclosed this in his deposition of May 19, 2000, well after Appellant gave the quoted deposition testimony of November 19, 1999. Therefore, the Respondents' degree of involvement in the post-1994 retaliation for Appellant's complaints was not known to Appellant until, at the earliest, May 19, 2000, well

after his charge of discrimination with the EEOC on February 4, 1999, his lawsuit in US District Court filed May 27, 1999, and his November 19, 1999, deposition. For Respondents to use Appellant's deposition testimony given by him when his view of Respondents' true actions and role in the retaliation against him was hidden and incomplete based on their own deceit, is most kindly stated, incomplete.

Respondents contend, at pages 14 and 15, that the Eastern District's Appellate Opinion in this case treats the "exclusivity standard" as dicta. Appellant would suggest that a close reading of the Opinion compels the conclusion that the exclusivity standard was not dicta, but was clearly the issue upon which the Eastern District's Opinion turned. To quote from the Opinion:

> "The record before this Court shows that Anheuser-Busch had a legitimate reason for terminating Kunkel as part of its budget-cutting and reduction-in-force. There is no genuine dispute of material fact that Kunkel's whistleblowing action with respect to M&R was not the exclusive cause of his termination.
>
> ….
>
> Because we hold that there was not an exclusive causal connection between Kunkel's whistleblowing actions in 1994, and his termination from Anheuser-Busch in 1998, we do not need to address Kunkel's other points on appeal." (A 23, 24).

In light of that analysis and statement in the Eastern District's Opinion, Appellant would suggest that it is wishful thinking for Respondents, in their Statement of Facts, to contend that the exclusivity issue has been treated as dicta.

At page 15, Respondents appear to argue that inasmuch as, in its view, the "exclusivity issue" is dicta, Appellant's Request for Transfer pursuant to Supreme Court Rule 83.02, based on a misuse of the exclusivity standard issue, is wrong and somehow it is improper for this Court to hear their case.

First, exclusivity was clearly not dicta to the Court of Appeals or the lower Court. Second, the clear thrust of Article 5, Section 10 of the Missouri Constitution, and Supreme Court Rules 83.02 and 83.09 is that any case coming to this Court may be finally determined the same as on original appeal. Accordingly, the hearing in this case is, as it was before the Eastern District, de novo on all issues.

At pages 20 and 21, Respondents apparently attempt to raise another issue intending to limit this Court's review based on the fact that the Eastern District's Opinion was a per curiam, Memorandum Opinion. In light of the above quoted Constitution and Supreme Court Rule provisions, it would appear that this is not a well-founded position.

ARGUMENT

FACTS

As to the facts, the focus of this De Novo Review must be on whether there is, in the record, enough to demonstrate genuine issues of material fact. Appellant suggests Respondent attempts to nudge the judicial view of this Summary Judgment case well beyond the point of

whether there are genuine issues of fact and make it a full and final trial of the ultimate fact issues in the case. In addition to these elements admitted by Respondents, there are genuine issues of all material facts constituting the elements of the pleaded cause of action.

First, there are evidentiary references in the record that create a genuine issue as to whether Appellant reported wrongdoing by his employer. This is shown as follows:

Appellant reported to his superiors that Respondent's employees in the Merchandising Department wrongfully benefited from the M&R relationship by obtaining personal items and having M&R bill Respondent for these personal items in the M&R monthly invoice for warehouse operations (LF 240, line 8 through 242, line 5; LF 198, line 20 through 201, line 24). And further, in quid pro quo, that M&R was billing and being paid by Respondents for warehouse space that didn't exist (LF 63, lines 5-17). Appellant's reporting resulted in Respondents' employees working to remove Kunkel (LF 242, lines 12-25). As to whether this is a genuine issue of fact, indeed it has not been controverted by Respondent.

Second, there are facts creating a genuine issue as to whether A-B so dominated M&R as to make M&R an alter ego of A-B, and, effectively, M&R an operating division of A-B. (LF 214, line 24 through 215, line 2; LF 217, line 1 through 218, line 16; LF 220, lines 21-24; LF 222, line 21 through 223, line 1; LF 223, line 20 through 224, line 22; LF 225, lines 18-23; LF 231, lines 2-4, and lines 9-25; LF 232, lines 10-16; LF 235 lines 1-14; LF 237, line 8 through 238, line 9). This also has not been factually controverted by Respondent at Summary Judgment, although they argue the point.

Third, there are clearly either admissions of Appellant's employment by Respondents, of wrongdoing and reporting, and eventually termination of employment, all cited in Appellant's Substitute Brief.

Fourth, there are facts creating a genuine issue as to what occurred during the passage of time from June, 1994 (letter and removal from M&R), to November, 1997 (placement for layoff), and whether this represents retaliation. The instances of demeaning work, no raises, and no performance reviews, are documented in Appellant's Substitute Brief. Additionally, the retaliation between 11/97 and 6/30/98 is also documented.

Fifth, setting aside the inherent implausibility of one person being the sole decision maker in such a reduction of force, there are facts in the record controverting whether Reynolds was the sole decision-maker, or whether, on the other hand, Hoffmeister too was a decision-maker as to Appellant's layoff. The facts are also referred to in Appellant's Substitute Brief.

Additionally, Respondent repeatedly suggests that this is a desperate effort or interminable crusade by Appellant, and bitterly laments the fact they must defend this claim over the time it has taken. In response, and to put their complaint in the context it requires, Appellant would point out to the Court that from June, 1994, until May 19, 2000, the date of Bruce Wilson's deposition, Appellant was unaware of the hidden role Respondents played in having him removed from M&R. Respondent did not investigate the charges in the June, 1994, letter. They hid from Appellant their under-handed and deceitful retaliation against him. Any

complaints of the length of time necessary to unravel the mystery of why he was so mistreated ought to belong to Appellant.

LAW

As to knowledge by the decision maker, Respondents rely heavily on Williams v. Thomas, 961 SW2d 869 (Mo. App. 1998), a case easily distinguished from the facts of our case. In Williams, also a Summary Judgment case, the plaintiff had no facts to present at Summary Judgment Motion Hearing to refute the employer's contention he did not know of employee's whistleblowing when he discharged her.

In our case, Hoffmeister did know of the letter of June 10, 1994, he did participate in the June, 1994, meeting with Appellant, Luhrs, and Powell, resulting in the retaliatory removal of Appellant from M&R and he did then subsequently participate in the decisions resulting in Appellant's layoff. In Williams, there was no fact issue as to whether Dr. Thomas, the firing authority, knew of employee's whistleblowing. Indeed in our case, Appellant would submit the fact of the knowledge on the part of the decision maker may be beyond the point of merely being an issue – to this point, Hoffmeister has not controverted his sworn deposition testimony that he did participate with Reynolds in the layoff decision. It is noteworthy that, while Hoffmeister does not clearly remember the June 10, 1994, letter and June, 1994, meeting about it, Appellant, Luhrs, and Powell, the other participants, do.

As to exclusive causation, Appellant would point to the recently promulgated revision to MAI-Civil 31.24, which is apparently a response to Diehl v. O'Malley 95 SW3d 82 (Mo., Banc., 2003). This instruction was approved March 7, 2005, to be effective July 1, 2005.

Appellant would point out that the instruction posits the "protected classifications" as the "contributing factor" to the defendant's discriminatory act. In analyzing the right to a jury trial under the Missouri Human Rights Act, Diehl v. O'Malley analogizes claims under that Act to common law tort claims seeking money damages, in terms of their entitlement to a jury trial. Presumably this Court has published Missouri Approved Instructions – Civil 31.24 as a response to that analysis. If this instruction is designed to respond to and announce the law in MHRA cases, that are felt by this Court to be analogous to tort claims, then Appellant would suggest that the same form and terminology of jury instruction, i.e. statement of the law, is appropriate for a whistleblower common law tort claim.

Appellant suggests that there are various formulations of proposed jury instructions that might state the law.

Your verdict must be for plaintiff if you believe:

First, the plaintiff was employed by defendant, and

Second, that the plaintiff reported wrongdoing or violations of law or public policy by the defendant or fellow employees to superiors, and

Third, that defendant discharged plaintiff, and

Fourth, that the reporting of wrongdoing or violations of law or public policy by the defendant or fellow employees to superiors was a contributing factor in such discharge, and

Fifth, as a direct result of such discharge, plaintiff sustained damage (relying on MAI 31.24)

Or

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff reported wrongdoing or violations of law or public policy by the defendant or fellow employees to superiors, and

Third, that defendant discharged plaintiff, and

Fourth, that the reporting of wrongdoing or violations of law are public policy by the defendant or fellow employees to superiors was the primary (or predominant cause of such discharge), and

Fifth, as a direct result of such discharge, plaintiff sustained damage. (relying on MAI 6th 23.13)

Additionally, the Respondents suggest this Court rely heavily on the workers' compensation retaliation cases, Crabtree v. Bugby, 967 SW2d 66 (Mo. Banc. 1998), and Hansome v. Northwestern Cooperage Company, 679 SW2d 273 (Mo. Banc. 1984), in confirming the approval of "exclusive causation" in whistleblower retaliation cases.

While it appears that the exclusive causation language in Hansome appears to have been plucked out of thin air, there are differences in the policy considerations that underlie the workers' compensation statutory scheme and its judicial interpretations that might be said to partially explain the different types of treatment that ought to be accorded to employers and employees in workers' compensation retaliation cases, on the one hand, and those in whistleblower retaliation cases on the other hand.

First, the assertion of an employee's rights under the workers' compensation law are far more akin to an automatic set of rights that are triggered by the fact that the injury occurred on the job. This is distinct from a whistleblower claim in which an employee's rights only come about when he complains of wrongdoing and then is fired by his employer. That is to say, the employee must show far more active wrongdoing by an employer under the whistleblowing concept.

Second, there would seem to be, almost by common sense analysis, a far larger number of potential workers' compensation claims and, therefore, rights associated with them, than there would be whistleblower claims.

Third, the workers' compensation statutory scheme sets up a scheduled recovery, entitling an injured worker to temporary total disability payments while he is off work, provision of medical care for the treatment of his injury, and a permanent partial disability monetary award based on a published schedule of injuries if he sustains a permanent injury. On the other hand, under whistleblower, the damages are far less certain and clear of determination.

Further, under the workers' compensation statute, it is not necessary for an employee to prove fault or negligence on the part of the employer to recover for an on-the-job injury. In common law whistleblowing retaliation, it is necessary for the employee to prove fault at every step of the claim.

Finally, an on-the-job injury may often carry with it absence from work and inability to do the work, that, by themselves, create possible reasons an employer would want to discharge

an injured employee. This may complicate the reason for a discharge and call for a clearer and more stringent causation standard.

Despite Appellant's general disagreement with exclusive causation in workers' compensation retaliation cases, the overall comparison of a workers' compensation retaliation claim, on the one hand, and a whistleblower retaliation claim, on the other hand, from the standpoint of the employer's exposure and liability, suggests that a Court may feel compelled to make the workers' compensation retaliation more dependant upon exclusive causation so as to even the playing field between employer and employee. This is a situation that does not obtain in whistleblower retaliation, and thus there is a factual and common sense distinction between the two and common sense reasons for not applying the exclusive causation used in workers' compensation retaliation to employee whistleblowing retaliation.

Furthermore, to apply the exclusive causation standard of workers' compensation, to whistleblower retaliation, would tend to make whistleblowing and its potential beneficial outcomes for society far less useful.

As to exclusivity, it is interesting that Respondents would condemn what Appellant suggests is a reasonable modification of the exclusive causation standard in this case as "judicial fiat" (Resp. Sub. Br. P. 22 fn. 6), while at the same time it asks this Court to rely on Crabtree and Hansome, cases which judicially engrafted onto the workers' compensation retaliation statute an exclusive causation standard not found in the statute, presumably by a similar act of what it now terms "judicial fiat." Appellant suggests to the Court that such "fiat" is agreeable if it benefits the Respondent but fodder for revolution if it doesn't.

Respondent suggests that modifying the exclusive causation standard would eviscerate the employment-at-will doctrine and cause economic catastrophe. The many states that do not use this exclusive causation standard give the lie to this argument.

CONCLUSION

Hopefully Appellant and "his ilk" (Resp. p. 41) will find this Court accepting of the reasonable modification to the exclusive causation standard as a fair and reasonable response to a wrong in search of a remedy, that without such modification can be nearly lifeless.

Upon application of a causation standard that does not require exclusivity causation, Appellant submits that there are clearly demonstrated genuine issues of material fact in this case that require reversal of the Summary Judgment and remand of this case to the trial level for further proceeding.

LAW OFFICES OF THOMAS B. HAYES

By: _____

Thomas B. Hayes, #21660
Attorney for Appellant
9200 Watson Road, Suite 130
St. Louis, MO 63126
(314) 842-7331
(314) 842-6975 (Facsimile)

CERTIFICATE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that this Reply Brief includes the information required by Rule 55.03, and complies with the limitations contained in Rule 84.06(b) in that it contains 3,048 words, exclusive of the cover page, signature block and certificates of service and compliance.

I further certify that, pursuant to Rule 84.06(g), the disk filed with Appellant's Reply Brief was scanned for viruses with Norton Anti-Virus Professional Edition 2003, and found to be virus-free.

_____